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IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

SMITH STEEL WORKERS D.A.L.U. 19806, AFL-CIO,
Petitioner,

v.

DARREL C. NOTTELSON

and

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether Title VII of the Civil Rights Act of 1964 provides an exemption in favor of those who object on religious grounds to paying union dues from the obligation of all employees to pay dues stated in a union security clause of a collective agreement?

2. Whether, if Title VII does so provide, thereby requiring other employees to subsidize union representation for religious objectors, the title is to that extent invalid under the Establishment Clause of the First Amendment?

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Smith Steel District D.A.L.U. 19806, AFL-CIO (hereinafter "the Union"), a directly affiliated local union of the American Federation of Labor and Congress of Industrial Organizations (AFL-CIO), respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit in *Darrel C. Nottelson, et al. v. Smith Steel Workers D.A.L.U. 19806, AFL-CIO, et al.*, 643 F.2d 445. A separate petition for certiorari seeking review of that judgment has been filed by A.O. Smith Corporation (hereinafter "the Company"), No. 81-97. (As the Company filed an appendix (and supplemental appendix) containing the decisions below, we cite herein to those appendices.)

OPINIONS BELOW

The district court entered three memoranda and orders. The first, dated December 7, 1979, is reported at 481 F.Supp. 756 and is reprinted in the Company's supplemental appendix beginning at B-1. The second, dated April 18, 1980, is reported at 489 F.Supp. 94 and is reprinted in the Company's supplemental appendix beginning at B-25. The third, dated September 18, 1980, is unreported and is reprinted in the Company's supplemental appendix beginning at B-45. The district court entered a judgment on April 18, 1980 which is reprinted in the Company's supplemental appendix beginning at B-19. The decision of the court of appeals is reported at 643 F.2d 445 and is reprinted in the Company's appendix beginning at A-1. The court of appeals' order denying rehearing is reprinted in the Company's supplemental appendix beginning at E-1.

JURISDICTION

The court below issued its opinion and judgment on February 27, 1981. That court issued an order denying the Union's timely petition for rehearing on April 20, 1981 (Supp. App. E). On July 13, 1981, Justice Stevens entered an order extending the time for filing this petition to and including August 18, 1981. (A copy of that order is reprinted at the back of this petition). This Court has jurisdiction to review the judgment of the Seventh Circuit pursuant to 28 U.S.C. § 1254(1).

STATUTES AND CONSTITUTIONAL PROVISION INVOLVED

Section 701(j) of Title VII of the Civil Rights Act of 1964, as amended in 1972, 42 U.S.C. § 2000e-(j), provides:

> For purposes of this title—
>
> • • • •

(j) The term "religion" includes all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate to an employee's or prospective employee's religious observance or practice without undue hardship on the conduct of the employer's business.

Section 703(a) of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a), provides:

(a) It shall be an unlawful employment practice for an employer—

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

Section 703(c) of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(c), provides:

(c) It shall be an unlawful employment practice for a labor organization—

(1) to exclude or to expel from its membership, or otherwise to discriminate against, any individual because of his race, color, religion, sex, or national origin;

(2) to limit, segregate, or classify its membership or applicants for membership, or to classify or fail or refuse to refer for employment any individual, in any way which would

deprive or tend to deprive any individual of employment opportunities, or would limit such employment opportunities or otherwise adversely affect his status as an employee or as an application for employment, because of such individual's race, color, religion, sex, or national origin; or

(3) to cause or attempt to cause an employer to discriminate against an individual in violation of this section.

Section 8(a)(3) of the National Labor Relations Act, 29 U.S.C. § 158(a)(3), provides in pertinent part:

(a) It shall be an unfair labor practice for an employer—

* * * *

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: *Provided*, That nothing in this subchapter, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in this subsection as an unfair labor practice) to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later . . .

The First Amendment to the Constitution of the United States provides in pertinent part:

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . .

STATEMENT OF THE CASE

A. The Facts

Throughout the period of Respondent Darrel Nottelson's employment with the Company, the Union was the exclusive bargaining representative of the Company's employees, and the Company and Union were parties to successive collective agreements containing a valid union security clause requiring employees to continue membership in the Union as a condition of employment. In 1966, Nottelson became a member of the Seventh Day Adventist (hereinafter "SDA") Church. A basic tenet of this religion provides that its members not join or financially support labor unions, although each member may personally decide whether to follow the tenet. Nottelson remained a member of the Union, and continued his dues payments, until December, 1974, at which time he notified the Company and Union that his religious beliefs prevented him from any longer belonging or paying dues to the Union, but that he was willing to contribute an amount equal to union dues ($10 per month) to a non-religious charity. Effective January 1, 1975, Nottelson discontinued dues payments to the Union, and commenced making monthly contributions in an equal amount to the American Cancer Society.

In March, 1975, the Union notified Nottelson that he would have to resume his dues payments, and pay his delinquent dues, else the Union would insist upon his discharge from employment pursuant to the union security clause. The Company notified Nottelson that it was willing to continue him in employment if the Union was willing to forego receipt of his dues, but not otherwise. On April 15, 1975 the Union expelled Nottelson from membership for non-payment of dues. In May, 1975, the Union offered to release Nottelson from any obligation to be a Union member, and to forego insisting upon his discharge if he would pay a representation fee

to the Union in an amount equal to dues. Nottelson refused to make any payments to the Union as inconsistent with his religious beliefs, and on July 11, 1975 the Company discharged him in response to the Union's statement that if the Company did not comply with the agreement the Union would file an unfair labor practice charge and a grievance.[1]

B. The Decisions Below

Nottelson filed a charge with the Equal Employment Opportunity Commission, received a right to sue letter, and initiated this action.[2] Following trial, the district court concluded: that the Company and Union had violated Title VII's "reasonable accommodation" requirement (§ 701(j)) by discharging Nottelson rather than accepting his offer to pay amounts equal to union dues to charity (B-3-14);[3] that insofar as that requirement invalidates *pro tanto* union security agreements permitted by § 8(a)(3) of the National Labor Relations Act, "Title VII takes precedence over the NLRA" (B-30); and that § 701(j) as thus construed is not invalid under the Establishment Clause of the First Amendment, because "[i]t is a neutral provision with a satisfactory

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[1] Nottelson was initially discharged on April 24, 1975, but was reinstated six days later pursuant to a temporary restraining order issued by the district court. The TRO, with extensions, expired on July 10, 1975, and Nottelson was discharged again the following day.

[2] The instant suit was filed before Nottelson received a right to sue letter from the EEOC, was dismissed for that reason on July 10, 1975, without prejudice to its being reactivated upon receipt of such a letter, and was reactivated following issuance of an EEOC right to sue letter on July 21, 1975.

[3] Throughout this brief, "B" refers to the pages so numbered in the Supplemental Appendix filed with the Company's petition, No. 81-97, and "A" refers to the pages so numbered in the appendix bound with the Company's petition.

purpose—to prevent discrimination resulting from the unreasonable refusal to accommodate religious beliefs and practices" (B-35, quoting and following *Tooley v. Martin-Marietta Corp.*, 476 F.Supp. 1027, 1030 (D. Ore. 1979).[4]

The Company and Union appealed, and the EEOC was granted leave by the court of appeals "to intervene on plaintiff's behalf" (A-6). The court of appeals (Judge Pell dissenting) affirmed the district court's decision in all material respects. That court "agree[d]" with the district court that "Title VII creates an exception to the NLRA's sanction of union security clauses" (A-7). And the court of appeals concluded that Title VII as thus construed is constitutional, relying on *Rankins v. Commission on Professional Competence*, 24 Cal. 3d 167, 593 P.2d 852 (1979), appeal dismissed for want of a substantial federal question, 444 U.S. 986 (holding that the Establishment Clause as incorporated into the Fourteenth Amendment is not offended by a state requirement that school boards "reasonably accommodate" the desires of teachers to take leave without pay to observe their holy days when substitutes are available) (A-12-13), and on the "principle of supremacy of conscience" declared in *Gillette v. United States*, 401 U.S. 437, 448-460 (holding that the selective service exemption for religious objectors does not violate the Establishment Clause).

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[4] As remedies, the court ordered the Company to reinstate Nottelson to employment; ordered the Company and Union to pay him backpay in the amount of his lost wages; enjoined the Company and Union from effecting his discharge for refusing to make payments to the Union so long as he makes payments of amounts equal to union dues to a non-union non-religious charity mutually agreed upon by Nottelson and the Union; and ordered the Company and Union to pay his attorney's fees (B-19-23, 49-50). The court also enjoined the Union from filing an NLRB charge alleging that the Company's retention of Nottelson on these terms violated the Union's rights under the NLRA (B-23, 42-43).

Judge Pell dissented from the majority's ruling on the constitutional issue. He rejected the majority's reliance on *Rankins* because the accommodation obligation in *Rankins* did not have an adverse impact upon either the school board or other employees (A-20-21), and far from creating a "preference of one religion over another" it *lessened* religious preference because the regular school calendar provided holidays on the principal Christian holy days (A-21). As for *Gillette*, Judge Pell answered the majority's contention that charitable contributions are a means by which religious dues objectors could "fulfill their societal obligations in a different manner:"

> The fact should not be significant that by paying over to a charity an amount equivalent to dues Nottelson expands the same amount of money as does another employee who may not be in favor of the Union representing him but who cannot fall back upon a claimed religious tenet. The merchant who sells merchandise, or the lawyer who sells service, would scarcely regard that he was receiving a quid pro quo to which he was entitled if the price or the fee was instead paid over to a charity no matter how worthwhile or deserving that other recipient might be. No more, it seems to me, should Nottelson be entitled to the services without paying for them in the same manner as his fellow employees. In sum, he is a "free rider," plain and simple. [A-18-19].

Petitions for rehearing filed by the Company and Union were denied, and their suggestions of rehearing *en banc* were denied, apparently by an evenly-divided court. (The order recited that "a majority of the active members of the Court have not voted to grant a rehearing *en banc*," but noted that "Chief Judge Fairchild and Circuit Judges Pell, Wood and Bauer voted to grant the petition" (E-2).)

REASONS FOR GRANTING THE WRIT

This case involves two issues that Congress and this Court have found sensitive and difficult: the issue of the extent to which employees represented by a union should be required to financially support their exclusive representative and the issue of the extent to which religious objectors should be exempted from otherwise uniform financial requirements.

The court below and three other courts of appeals [5] have reached the unlikely conclusion that Congress has dealt with the problem presented by passing two laws—Title VII of the Civil Rights Act of 1964 as amended and the National Labor Relations Act as amended—that set out differing substantive rules governing the obligations of religious objectors covered by union security agreements, and differing procedures for enforcing those rules. But the legislative history of Title VII leaves no doubt that Congress intended the NLRA and the NLRA alone to regulate this subject. We therefore submit that the lower courts' expansive reading of Title VII is palpably wrong. Those courts have failed, and this Court must therefore assume, the judicial "responsibility to reconcile [separate congressional enactments] where feasible." *U.S. v. National Assn. Securities Dealers*, 422 U.S. 694, 720 (1975).

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[5] Fifth Circuit: *Cooper v. General Dynamics*, 533 F.2d 163 (1976), cert. denied, 433 U.S. 908; *but see* 533 F.2d at 175-176 (Rives, J., concurring in part and dissenting in part).

Sixth Circuit: *McDaniel v. Essex International*, 571 F.2d 338 (1978).

Ninth Circuit: *Anderson v. General Dynamics*, 589 F.2d 397 (1978), cert. denied, 442 U.S. 921; *Burns v. Southern Pac. Transp. Co.*, 589 F.2d 403 (1978), cert. denied, 439 U.S. 1072; *Lutcher v. Musicians Union Local 47*, 633 F.2d 880 (1980); *Tooley v. Martin Marietta Corp.*, 648 F.2d 1239 (1981); *but see Yott v. North American Rockwell Corp.*, 501 F.2d 398, 399-401 (1974).

Having construed Title VII to require that the cost of providing union representation for religious objectors must be subsidized by the employees who do not share that religious objection, the lower courts also proceeded to uphold this requirement as consistent with the Establishment Clause. But, this Court has repeatedly held that a law that "single[s] out a class of . . . citizens for a special economic benefit" on the basis of religion violates the Establishment Clause. *Sloan v. Lemon*, 413 U.S. 825, 832. Those holdings rest on the Court's recognition that a principal impetus for adoption of the Establishment Clause was the aversion to governmentally-compelled tithing exemplified by Madison's Remonstrance that government should not be permitted to "force a citizen to contribute three pence only of his property" to support religion. The lower courts believed that the doctrine announced in *Gillette v. United States*, 401 U.S. 437, which recognized in the selective service context "the principle of supremacy of conscience," makes the basic rule against forced subsidization of another's religious beliefs inapplicable here. We recognize that the task of resolving the apparent tension between *Sloan* and *Gillette* is more difficult than the task of reading Title VII and the NLRA in conjunction. What is at stake here is whether those decisions are to be synthesized in a manner which effects a fundamental redefinition of the application of the Establishment Clause to subsidization cases. That, we submit, is plainly an issue to be decided by this Court.

I. The Relationship Between Tile VII and the NLRA.

Congress' determinations concerning the legality of various forms of union security are a central component of the national labor policy. As the Senate Report on the legislation that emerged as the Labor Management Relations Act of 1947 observed, "[a] controversial issue to which the committee has devoted the most mature

deliberation has been the problem posed by compulsory union membership." S. Rep. No. 105 on S.1126, 80th Cong., 1st Sess., p. 5. The outcome of the 1947 debate was to make the closed shop unlawful, to permit, as a matter of federal law, employers and unions to negotiate union shop and agency shop agreements, and to grant the states the option of enacting laws invalidating such agreements. See §§ 8(a)(3) and 14(b) of the NLRA as amended. "It is well known, and the legislative history of the 1947 Taft-Hartley amendments plainly shows, that § 8(a)(3)—including its proviso—represented the Congressional response to the competing demands of employee freedom of choice and union security." *Machinists Local v. Labor Board*, 362 U.S. 411, 418, n. 7.

At the time this case arose it was clear that under the NLRA union security agreements which require *all* unit employees "to pay their way" (*Labor Board v. General Motors*, 373 U.S. 734, 740-741 (1963)) by providing financial support for the exclusive representative obligated to serve all those employees equally (*Vaca v. Sipes*, 386 U.S. 171, 177 (1967)) were entirely lawful. Indeed, the efforts of religious objectors to invalidate such agreements under the Free Exercise Clause of the First Amendment had been uniformly rejected, the courts finding a "compelling governmental interest" in "requir[ing] a fair sharing of the costs of collective bargaining." *Linscott v. Millers Falls Co.*, 440 F.2d 14, 17 (1st Cir. 1971), *cert. denied*, 404 U.S. 872; see also *Gray v. Gulf, Mobile & Ohio R.R. Co.*, 429 F.2d 1064, 1072 (5th Cir. 1970), *cert. denied*, 400 U.S. 1001; *Otten v. Baltimore & O. R. Co.*, 205 F.2d 58, 61 (2nd Cir. 1953).[6]

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[6] Judge Learned Hand wrote in *Otten*, 205 F.2d at 61:

> The First Amendment . . . gives no one the right to insist that in the pursuit of their own interests others must conform their conduct to his own religious necessities. A man might find it incompatible with his conscience to live in a city in

The courts below proceeded as if Title VII is as a matter of course to be given priority over the NLRA. That approach is inconsistent with this Court's decision in *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63 (1977). There the Court held that Title VII's prohibition of religious discrimination is not to be construed to undercut decisions made by Congress which "lie[] at the core of our national labor policy" without a "clear and express indication from Congress" that it is so intended. *Id.* at 79. Thus, unless Congress in enacting and amending Title VII evinced an intent to regulate union security agreements through that Act as well as through the NLRA, such agreements are regulated solely by the NLRA. Congress evinced no such intent.

There is no evidence in the legislative deliberations over Title VII—either in 1964, when the ban on religious discrimination was enacted, or in 1972, when § 701(j) was added to codify the EEOC's requirement of "reasonable accommodation"—that Congress intended to overturn the decisions respecting union security made in 1947. The exemption of religious objectors from union dues was never mentioned in the 1964 debates, and the EEOC, although construing the 1964 Act's ban on religious discrimination to require "reasonable accommodation", did

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which open saloons were licensed; yet he would have no constitutional right to insist that the saloons must be closed. He would have to leave the city or put up with the *iniquitous dens*, no matter what economic loss his change of domicile entailed. We must accommodate our idiosyncrasies, religious as well as secular, to the compromises necessary in communal life; and we can hope for no reward for the sacrifices this may require beyond our satisfaction from within, or our expectations of a better world.

not understand that requirement to entail exemption of religious objectors from the scope of union security agreements:

> The Commission was . . . required to determine whether an employee in a union shop may refuse to pay union dues on the grounds that such payments are prohibited by his religious beliefs. The Commission held that ". . . a union shop is not unlawful" and that Charging Party's refusal on religious grounds is protected by neither Title VII nor the First Amendment. [Sixth Annual Report, Equal Employment Opportunity Commission, p. 12 (March 30, 1972)].

Section 701(j) was added in 1972 "to resolve by legislation" doubts as to the correctness of the EEOC's understanding that the 1964 Act required "reasonable accommodation" (*Hardison*, 432 U.S. at 73-74). The concern which promoted its enactment—and indeed the only concern specifically discussed during the brief debate—was the plight of Sabbatarians whose ability to obtain and hold jobs was hampered by employer requirements of Saturday work. 118 Cong. Rec. 705-706 (1972). The "reasonable accommodation" which its sponsor sought to assure was that "employers on some occasions . . . adjust work schedules to fit the requirements of the faith of some of their workers." *Id.* The legislative history of § 701(j), which spans less than two pages of the Congressional Record, *id.*, contains no reference whatever to the subject of union dues. That Congress did not have union security agreements in mind when it enacted § 701(j) is particularly evident from the language of that provision, which speaks only of an "employer" duty to "reasonably accommodate".[7]

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[7] The courts of appeals which have construed § 701(j) to reach union security agreements have acknowledged the incongruity between their rulings and the language of § 701(j), albeit remaining

In contrast to the total absence of congressional consideration of union security in the context of Title VII, contemporaneous with the enactment of Title VII in 1964 and with its amendment in 1972, proposals to create an exemption from union security for religious objectors continuously were introduced in the form of proposed amendments to the NLRA. Religious objectors (and particularly the SDA Church) have repeatedly urged Congress to amend the NLRA to provide them an exemption from union security agreements.[8] Between 1965 and 1973, 8 bills were introduced seeking to amend § 8(a)(3) to create a dues exemption for religious objectors who offer to make equivalent payments to charities; none was enacted.[9] And the contemporaneous understanding of Congress that Title VII did not overturn the decisions respecting union security made in the 19.. amendments to the NLRA is dramatically evidenced by

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unwilling to draw the inference that Congress did not intend to reach union security agreements. See, *e.g.*, *Cooper*, *supra*, 533 F.2d at 170-171 (Gee, J.), 172-173 (Brown, C.J.), 175 (Rives, J.); *McDaniel*, *supra*, 571 F.2d at 344; *Yott v. North American Rockwell Corp.*, 602 F.2d 904, 909 (9th Cir. 1979), *cert. denied*, 445 U.S. 928; *Tooley*, *supra*, 648 F.2d at 1241; *and see* the decision below (A-4 n. 4).

[8] There are at least seven religions whose tenets include conscientious objection to financial support of labor unions. SDA (which has approximately 500,000 members) is the largest. Others are the Amish, Mennonites, National Association of Evangelicals, Christian Missionary Alliance, Old German Baptist, and Plymouth Brethren IV. 123 Cong. Rec. 36275 (1977).

[9] *Prior to the enactment of §701(j) in 1972.* Three bills were introduced in 1965 (89th Cong., 1st Sess.): H.R. 8962, 111 Cong. Rec. 13295, 18631; H.R. 9619, 111 Cong. Rec. 15558; H.R. 11666, 111 Cong. Rec. 27482. Two bills were introduced in 1966 (89th Cong., 2d Sess.): S. 3203, 112 Cong. Rec. 7844, 7847-48; S. 3153, 112 Cong. Rec. 6876, 6879. One bill was introduced in 1967 (90th Cong., 1st Sess.): H.R. 7683, 113 Cong. Rec. 7764. One bill was

legislative events surrounding proposed amendments to the NLRA immediately following enactment of § 701(j).

In 1973 a bill was introduced in the Senate to expand the NLRA's definition of "employer" to embrace non-profit hospitals, which until then had not been covered by the NLRA. That bill was of paramount interest to the SDA Church, which operated 49 hospitals and nursing homes in the United States. Leg. Hist. at 285.[10] Spokesmen for the Church testified at hearings on the bill in 1973 that existing law provided no exemption for religious dues objectors, and they urged *inter alia* an amendment providing "some kind of exemption" from dues obligations under union shop agreements for those employees with religious objections to such payments. *Id.* at 120-121, 132.

The Committee reported out the bill to extend NLRA coverage to the health care industry without any dues exemption. In the course of the Senate debate, Senator Dominick proposed an amendment which would have pro-

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introduced in 1970 (91st Cong. 2nd Sess.): S. 4008, 116 Cong. Rec. 20928.

Subsequent to enactment of § 701(j) in 1972. One bill was introduced in 1973 (93rd Cong., 1st Sess.); S. 2109, 119 Cong. Rec. 22208.

In 1974 Congress did create a *partial* exception, applicable only to the health care industry, by enacting § 19 of the NLRA. See pp. 15-17, *infra*. And in December, 1980, Congress amended § 19 to provide a form of exemption in all industries. See pp. 17-18, *infra*.

[10] Throughout this petition, we will use the term "Leg. Hist." to refer to *Legislative History of the Coverage of Non-profit Hospitals under the NLRA, 1974*, published by the Senate Committee on Labor and Public Welfare, 93rd Cong., 2nd Sess. (Committee Print 1974).

vided a religious dues exemption not merely for employees in that industry, but for all employees covered by the NLRA, so long as an equivalent amount were contributed to charity. *Id.* at 193. He observed that "as we all know" there was no such exemption under existing law, *ibid.* He reminded his colleagues that "a few years ago" the SDA Church had urged Congress to provide such an exemption, but that the sought-after exemption had not been enacted. *Id.* at 193-194. Senator Dominick explained that, in consequence, under existing law members of the SDA Church were required to forego employment in bargaining units covered by union shop agreements in order to remain faithful to their religious beliefs, and he urged that "there ought to be something in the law which makes this type of employment available for people who hold these religious beliefs. . . ." *Id.* at 196.

Senator Dominick's proposal met with vigorous opposition. Senator Javits agreed that existing law required SDA members to "pay their part of the cost," *id.* at 200, and he dismissed Senator Dominick's proposed substitute (that religious objectors pay an equal amount to charity) as not "mean[ing] anything to the union in question which has to bear the cost. The union has an interest in avoiding 'free riders'." *Ibid.* See also *id.* at 203-204. (Sen. Taft). The Dominick amendment was tabled, *id.* at 212, and the bill to extend NLRA coverage to nonprofit hospitals was passed by the Senate without any provision for exemption of religious dues objectors, *id* at 258-260.

The bill was then sent to the House, and was reported out by the House Committee with no dues exemption provision. Four congressmen appended "additional views" to the House report urging that the bill be amended to provide a dues exemption for religious objectors employed

by non-profit hospitals, there being no such exemption under existing law, *id.* at 285. When the bill reached the House floor, Representative Erlenborn proposed such an amendment, explaining that existing law contained no exemption, *id.* at 298. In the ensuing debate, proponents and opponents agreed that no such exemption then existed. *Id.* at 299, 333 (Rep. Thompson); 299 (Rep. Erlenborn); 334-335 (Rep. Green).

The Erlenborn amendment was approved by the House, *id.* at 335; the House bill was passed with an exemption for religious objectors employed in the health care industry, *id.* at 338; the Senate and House bills went to a conference at which the Senate acceded to the exemption, *id.* at 348; and both the Senate and the House approved the conference report, *id.* at 384, 408. The conferees in both houses characterized the bill as creating an "exemption" for employees in the health care industry from the requirement in all other industries that religious objectors pay dues under union shop agreements. *Id.* at 361 (Sen. Williams); 374 (Sen. Taft); 386 (Rep. Thompson).

Six years later, in December 1980, Congress amended § 19 of the NLRA to provide a form of dues exemption to all employees covered by the NLRA[11] but one which

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[11] Section 19 of the NLRA, as enacted in December, 1980, is codified as 29 U.S.C. § 169, and provides:

> Any employee who is a member of and adheres to established and traditional tenets or teachings of a bona fide religion, body, or sect which has historically held conscientious objections to joining or financially supporting labor organizations shall not be required to join or financially support any labor organization as a condition of employment; except that such employee may be required in a contract between such employees' employer and a labor organization in lieu of periodic dues and initiation fees, to pay sums equal to such dues and initiation fees to a nonreligious, nonlabor organization charitable fund exempt from taxation under section 501(c)(3) of Title 26, chosen by such employee from a list of at least three such

differs substantially from the lower courts' construction of Title VII [12] and commits enforcement to the NLRB.[13]

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funds, designated in such contract or if the contract fails to designate such funds, then to any such fund chosen by the employee. If such employee who holds conscientious objections pursuant to this section requests the labor organization to use the grievance-arbitration procedure on the employee's behalf, the labor organization is authorized to charge the employee for the reasonable cost of using such procedure.

[12] Section 19 of the NLRA contains no "undue hardship" exception as appears in § 701(j) of Title VII. On the other hand, § 19 authorizes unions to charge religious dues objectors who file grievances for the reasonable cost of using the grievance-arbitration procedure on their behalf. Section 19 extends dues exemption only to an employee who is a member of "a bona fide religion, body, or sect which has historically held conscientious objections to joining or financially supporting labor organizations"; by contrast, as noted in the opinion below (A-15, n. 12), the EEOC "has consistently interpreted the term 'religious' in relevant portions of Title VII as having the same broad meaning as the term has as used in the religious exemption provision in the selective service statutes." As explained in the EEOC's Religious Discrimination Guidelines, 29 C.F.R. § 1605.1:

> [T]he Commission will define religious practices to include moral or ethical beliefs as to what is right and wrong which are sincerely held with the strength of traditional religious views . . . The Commission has consistently applied this standard in its decisions. The fact that no religious group espouses such beliefs or the fact that the religious group to which the individual professes to belong may not accept such belief will not determine whether the belief is a religious belief of the employee or prospective employee. [Footnote omitted].

Thus, while Congress carefully shaped section 19 of the NLRA to assure that strongly-held secular views such as reflected in *Buckley v. American Fed. of Television & Radio Artists*, 496 F.2d 305 (2nd Cir. 1974), *cert. denied*, 419 U.S. 1093 and *International Union v. National Right To Work Foundation*, 590 F.2d 1139, 1143 (D.C. Cir. 1978) need *not* be accommodated, the EEOC in enforcing Title VII has opened the door to just such claims of right to exemption for secular views.

[13] Section 19 of the NLRA qualifies the proviso to § 8(a)(3) of the NLRA, and thus makes it an unfair labor practice (violative of

The lasting consequence of the error below is not to provide relief to religious objectors but to confound the substantive solution which Congress mandated in § 19 of the NLRA whose enforcement is within the NLRB's exclusive jurisdiction.

The lesson of *Teamsters v. Daniel*, 439 U.S. 551, 569-570 is therefore very much in point here:

> If any further evidence were needed to demonstrate that pension plans of the type involved are not subject to the Securities Acts, the enactment of ERISA in 1964, 88 Stat., 829, would put the matter to rest. Unlike the Securities Acts, ERISA deals expressly and in detail with pension plans. * * *
>
> The existence of this comprehensive legislation governing the use and terms of employee pension plans severely undercuts all arguments for extending the Securities Acts to non-contributory, compulsory pension plans. * * * Not only is the extension of the Securities Acts by the court below unsupported by the language and history of those Acts, but in light of ERISA it serves no general purpose * * * Whatever benefits employees might derive from the effect of the Securities Acts are now provided in more definite form through ERISA

This Court should therefore grant a writ of certiorari to remove Title VII and the EEOC from an area into which they have erroneously been thrust by the lower courts.

II. The Applicable Constitutional Principle.

Section 701(j) as construed by the lower courts requires all the other employees in the bargaining unit to subsidize the provision of union representation to Seventh

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§§ 8(a)(3) and 8(b)(2)) for an employer to discriminate against an employee protected by § 19 for refusing to pay dues or for a union to cause or attempt to cause an employer to do so.

Day Adventists and other religious objectors. Religious objectors, solely because of their religion, are accorded a benefit denied to all others, no matter how strong the latter's *secular* objections to paying union dues;[14] and those others must finance the services which the union is required to furnish to the religious objectors. As thus construed, § 701(j) poses serious Establishment Clause questions—indeed, it is unlike any governmental regulation heretofore upheld by this Court under that Clause.

This Court's decisions to date have been consistent that a law that, on the basis of religion, "single[s] out a class of . . . citizens for a special economic benefit" has a legislative effect the Establishment Clause was designed to forbid. *Sloan v. Lemon*, 413 U.S. 825, 832. As this Court has explained, the Establishment Clause was a reaction to the English practice, carried over into some of the Colonies, of governmental "taxing", or "tithing", of citizens to support religious activities. *Everson v. Board of Education*, 330 U.S. 1, 9-14. Imbued with "the conviction that individual religious liberty could be achieved best under a government which was stripped of all power to tax, to support, or otherwise to assist any or all religions," *id.* at 11, advocates of the First Amendment achieved an Establishment Clause which "means at least this,":

> Neither a state nor the Federal Government . . . can pass laws which aid one religion, which aid all religions, or prefer one religion over another . . . No tax in any amount, large or small, can be levied to support any religious activities. . . . [*Id.* at 15-16.][15]

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[14] That there are persons with strong *secular* objections to paying union dues is evidenced by such cases as *Buckley, supra*, and *National Right To Work Foundation, supra*, n. 12.

[15] See also, *Abingdon School Dist. v. Schempp*, 374 U.S. 203, 225, quoting Madison, Memorial and Remonstrance Against Religious Assesments, II Writings of Madison 183, 185-186.

Based upon these considerations, this Court, without exception, has struck down every statute which conferred an economic benefit exclusively, or even primarily, upon members of particular religious sects, or upon members of all religions to the exclusion of non-religionists. See, e.g., *Committee for Public Education v. Nyquist*, 413 U.S. 756, 775, 781-782, 782-783 n. 38, 788-789, 793-794; *Sloan, supra*, 413 U.S. at 830, 832; *Meek v. Pittinger*, 421 U.S. 349, 363-364.[16]

The lower courts have relied on *Gillette v. United States*, 401 U.S. 437, 453, where this Court, recognizing the tension between the Establishment Clause and the Free Exercise Clause, upheld the selective service exemption as appropriate to vindicate "the principle of supremacy of conscience."[17] See also *Wisconsin v. Yoder*,

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[16] Cases in which financial aid has been upheld all have been justified by the principle that "religious institutions need not be quarantined from public benefits that are neutrally available to all." *Roemer v. Maryland Public Works Bd.*, 426 U.S. 736, 746. See, e.g., *Everson, supra*, 330 U.S. at 17; *Board of Education v. Allen*, 392 U.S. 236, 243; *Walz v. Tax Commission of The City of New York*, 397 U.S. 664, 671-673, 676; *id.* at 689 (Brennan, J., concurring); *id.* at 696 (Harlan, J., concurring); *Wolman v. Walter*, 433 U.S. 229, 242.

[17] The court below also thought that the result it reached was dictated by *Rankins v. Commission on Professional Competence*, 24 Cal. 3d 167, 593 P.2d 852 (1979), appeal dismissed for want of a substantial federal question, 444 U.S. 986. But as the Ninth Circuit subsequently recognized in *Tooley, supra*, "this case and *Rankins* involve entirely different kinds of religious accommodations," 648 F.2d at 1244 n. 8. See also the dissent below, A-20-21. The issue in *Rankins* was whether California could compel school boards to grant leave without pay to non-Christians who wished to observe their holy days, when substitute teachers were available. In finding no infringement of the Establishment Clause, the California Supreme Court relied exclusively upon two factors not present in the instant case.

First, permitting the plaintiff to take leave in *Rankins* "does not necessitate expenditure of money," 593 P.2d at 859. On this basis, the Court distinguished *Mandel v. Hodges*, 54 Cal. App. 3d 596,

406 U.S. 205, 234-235 n.22 (1972). The lower courts without full consideration have carried over *Gillette* to cases, such as this, in which the exemption results in compelled private subsidization along religious lines. But *Gillette* provides the occasion for further analysis; it did not set out a new synthesis. How to harmonize *Gillette* with the line of cases invalidating "special economic benefits" to particular religious sects is a delicate constitutional question this Court has not yet addressed. Indeed the Court has recognized that § 701(j), unless narrowly construed, could pose serious Establishment Clause questions. *TWA v. Hardison, supra*, 432 U.S. at 69-70 n. 4; *id.* at 89-90 and n.3 (Marshall, J., dissenting). Given the frequency with which the issue has arisen in the lower courts in the union security context, this is an appropriate case in which to undertake that important task.

610-615, 127 Cal. Rptr. 244, 253-256 (App. First Dist.), in which the state's granting of "paid three-hours-off for state employees on Good Friday" was held violative of the Establishment Clause. *Rankins*, 593 F.2d at 859.

Second, permitting the absence of the plaintiff on his holy days did not constitute "preference of one religion over another." 593 P.2d at 859. On the contrary, the regular school calendar provided holidays on the principal Christian holy days, so that the effect of permitting absences without pay to plaintiff on *his* holy days "is simply to lessen the discrepancy between the conditions imposed on [the plaintiff's] religious observances and those enjoyed . . . by adherents of majority religions," *ibid.*

Thus, the dismissal of the appeal in *Rankins* (from which three Justices dissented, 444 U.S. 986) does not control this case, indeed it does not even inform the analysis required to resolve the issue posed in this case.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

SUPREME COURT OF THE UNITED STATES

No. A-22

SMITH STEEL WORKERS D.A.L.U. 19806, AFL-CIO,
Petitioner

v.

DARREL C. NOTTELSON, EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, AND A. O. SMITH CORPORATION

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

UPON CONSIDERATION of the application of counsel for petitioner(s),

IT IS ORDERED that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including August 18, 1981.

/s/ John Paul Stevens
JOHN PAUL STEVENS
Associate Justice of the Supreme Court of the United States

Dated this 13th day of July, 1981